

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME, COUNCIL 5, LOCAL 340**

and

HENNEPIN COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS Case # 06-PA-699

JEFFREY W. JACOBS

ARBITRATOR

June 28, 2006

IN RE ARBITRATION BETWEEN:

AFSCME Council 5, Local 34,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case 06-PA-699

Hennepin County.

APPEARANCES:

FOR THE UNION:

Matt Nelson, Business Representative
Marcia Riopelle, Grievant
Clifford Robinson, Social Worker
Laura Kennedy, C.P. Permanency Worker

FOR THE COUNTY

Christina Yates, Labor Relations Representative
Trisha Massey, Assoc. Clinic of Psychology
Kathleen Fisher, Assoc. Clinic of Psychology
Linda Veitch, Unit Supervisor
Jamie Cork, Assistant Hennepin County Attorney

PRELIMINARY STATEMENT

The hearing in the above matter was held on April 3, 2006 at 10:00 a.m. in Room A-400 in the Hennepin County Government Center in Minneapolis, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs postmarked June 8, 2006 and received by the arbitrator on June 9, 2006 at which point the record was considered closed.

ISSUES PRESENTED

The parties stipulated to the issue as follows: Did the employer have just cause to suspend the grievant and if not, what shall be the remedy?

PARTIES' POSITIONS

COUNTY'S POSITION:

The County's position is that there was just cause for the grievant's 10-day suspension since she acted to reunite children in a family with their mother without Court authorization and before consulting with her supervisor. In support of this position the County made the following contentions:

1. The grievant was employed as a Child Protection Social Worker for the County and has been for a number of years. As such she either knew or should have known the County's policies with respect to reunification of children with parents after their removal and should also have known what the term, "Authorize reunification by progress report" meant and what it does not mean.

2. The grievant was familiar with her job description and the County policies with respect to placement, See Employer Exhibit 7, and the requirement that she consult with her supervisor prior to reunification of children. These policies were introduced as Exhibit 8 and 9 by the County. See also, Exhibit 6, M.S. 260C.101, et seq., granting original and exclusive jurisdiction over children who are in need of protection services to the Juvenile Court. It is significant that the draft of County Exhibit 8 was updated last on 4-11-02, well before this incident occurred.

3. The grievant was assigned to a case involving a client KP whose children were removed following several incidents of domestic abuse, and incidents of alcohol and substance abuse by KP. KP has three children, one aged 10, and two younger children ages 4 and 5 at the time of these incidents.

4. KP's oldest child was reunified with her mother by Court order dated May 5, 2005. That Order provided however that "reunification of [the child] authorized with [KP] on a schedule to be worked out between the parties." The County asserted that this gave the right to reunify the child with her mother without further notification of the court and that this is a commonly used term in the child protection arena.

5. The Court did not however use the same language when dealing with the younger two children when it adjudicated their interests later in May 2005. That order, dated May 23, 2005 provided that "authorize reunification of [the 2 younger children] by progress report." The County asserted that this meant that the grievant did not have the authority to simply reunify them automatically and that, as an experienced child protection worker, she should well have known that.

6. In fact KP's treating psychologists did not agree that she was ready to take the younger children. See County exhibits 1, 2 and 4. The County asserted that the grievant did not get clearance to reunify the children with these professionals yet she proceeded anyway. These individuals testified that they either were not aware that the reunification was about to occur and that if they had they would have expressed concern about it prior to it being done. In addition, the County attorney, Ms. Cork, testified that she was given information that led her to believe that the grievant had consulted with these individuals and that they had concurred with reunification.

7. Further, Ms. Cork's message to the grievant was not to proceed with reunification but rather to "get the Court notification through right away." Employer Exhibit 21. This was a clear message to the grievant that she needed to get Court notification before reunification.

8. The County further asserted that the grievant did not consult with her supervisor, as she was clearly required to prior to the reunification. While there was some vague reference to the reunification at a conference she did not at all make it clear that the reunification was imminent nor did the context of this conversation give the supervisor the time or information necessary to adequately review the case before giving her approval.

9. The grievant reunified the children without approval of the Court and without properly notifying her supervisor, Ms. Veitch. They were apparently reunified on June 9, 2005 in clear contravention of the Court's order and even after KP had missed several critical alcohol sensors and despite the misgivings of the guardian ad litem and the treating physicians.

10. After the reunification, the Judge was angry to say the least and ordered the immediate removal of the children from KP's custody, thereby causing considerable stress on the entire family. He then contacted Ms. Veitch and essentially berated the Department for acting outside of its authority under his Order, banned the grievant from ever appearing in his Courtroom again and eventually apologized to KP in open Court for having to put her and her children through the ordeal of reunification and then having to tear them apart again.

11. The County argued that a 10-day suspension was more than justified given the fact that the grievant misrepresented the opinions of the treating psychologists and therapists to the County Attorney, her supervisors and the Court. She brought disrepute to the department and caused considerable anguish to a family that was relying on her professionalism and expertise. The essence of the County's argument is thus that the grievant acted without authority when she reunified the children on June 9, 2005, she failed to consult with her supervisors before doing so and that she misrepresented facts to both the Juvenile Court and to her department.

The County requests an award denying the grievance in its entirety.

UNION'S POSITION

The Union's position is that the County did not have just cause for the suspension and that the grievant did not violate any rules in making her decision to reunite the affected children with their mother. In support of this position the Union made the following contentions:

1. The grievant is a long time employee in this department with a very good work history. She is experienced and dedicated. There is no way that she would have simply acted without authorization if she had had any inkling that her actions in reunifying these children would have resulted in her discipline.

2. The Union further argued that the County did not have a consistent policy with regard to reunification. Union witnesses testified too that they would have felt comfortable reunifying the children under these circumstances. The grievant testified to this as well. Moreover, the Union argued that the County's policy changed only after this incident.

3. The Union's main argument was that the grievant *was* authorized to reunify and then contact the Court under these circumstances. The court's order of May 23, 2005 specifically said that the reunification was authorized by progress report. The grievant was therefore acting within her authority to reunify and then contact the Court notifying it of the fact afterwards. She has done this in this manner many times before without incident.

4. In this matter, the Court had authorized reunification if KP continued to make progress and continued to provide clean UA and alcosensor compliance. The Union argued that KP 's progress between the time of the court proceeding and the reunification was certainly good enough to warrant reunification.

5. The Union also argued that there were circumstances that made it unsafe for the children to be in the foster care they were in. There was some evidence to suggest that drugs and even worse was occurring in the home where the younger children had been placed. Thus it was incumbent upon the grievant to get them out of there immediately to avoid placing them in further danger.

6. Further that Ms. Veitch was aware of the reunification prior to its being done and that the grievant's actions in telling her at the conference that the reunification was being done was sufficient to satisfy any requirement of such consultation. She signed off on the original progress report, the one the County attempted to suppress. It is clear that initially she knew what was going on.

7. Only after the Judge called Ms. Veitch and was very angry were the grievant's actions called into question. The Union argued that the grievant is simply being scapegoated because the Judge did not recall what he said and what the parties told him at the prior hearing.

8. The grievant was under the impression that she could reunify as long as services were continued. Accordingly, she wrote that into the original progress report so the court would know that services were continuing and that the case was not closed.

9. The grievant also notified the County Attorney prior to the reunification. In fact the grievant specifically sought Ms. Cork's input on reunification and asked her about it. In response to these inquiries, Ms. Cork responded, "Yes I am OK with reunification but let's get the Court notification through right away." The grievant reasonably assumed that this meant that she could proceed with reunification and then contact the Court by progress report, i.e. the notification Ms. Cork referred to. There was nothing in that message that would have placed the grievant on notice that she needed to get prior approval of the Court before reunification.

10. There were several glaring inaccuracies in the Judge's comments as well. He indicated that no one knew of the reunification prior to it being done. The Union contends this is false. Ms. Veitch knew and Ms. Cork knew. Ms. Veitch even signed off on the original progress report.

11. The grievant did not falsify her statements to the Court or to her supervisors. She alleged that she did in fact talk to both of KP's therapists prior to the reunification and that both gave her the authority to recommend reunification.

12. The essence then of the Union's argument is that the County in effect changed its policy in response to this situation. It is clear under arbitral precedent and generally accepted labor relations concepts that the policy must be in place before discipline can be imposed. Moreover, the grievant took every appropriate action to notify her supervisor and the County Attorneys of the reunification. There was nothing out of the ordinary that she did and she should not be disciplined for acting the way she and most other personnel in the department would have acted.

The Union requests an award sustaining the grievance, expunging the grievant's record of any discipline and awarding her full back pay and accrued benefits due to the County's actions herein.

DISCUSSION

Many of the operative facts in the matter were undisputed. The grievant has been employed as a Child Protection Service Worker, CPSW, for Hennepin County since 1997. She has a clean and otherwise exemplary discipline file. As a Child Protection Worker part of her duties is to be certain that children who have been removed from their homes as the result of unsafe conditions in the homes are properly cared for and safe. The evidence showed too that pursuant to Minn. Stat. ch. 260C the Juvenile Court has exclusive jurisdiction over any child who is alleged to be in need of protective services. Hennepin County receives some 16,000 calls for service in this regard.

The parties' stipulation provides that the grievant was responsible for completing a risk assessment using structured decision making protocol, preparing and documenting all aspects of the Protective service plan, monitoring compliance with the Orders of the Juvenile Court coordinating services and teaming with a variety of stakeholders. The evidence showed that some of these stakeholders would include, the parents, the children, the parties' therapists and health care providers, the Court and the Department.

This matter centers over the grievant's actions with regard to the reunification of the children of KP, a young woman with a history of substance abuse. KP has 3 children, one from a prior relationship and two with her then current husband. There was a history of significant domestic abuse, which apparently precipitated Child Protection becoming involved in KP's case in the first place. The children were removed from the home and placed in foster care. The grievant was assigned to the case.

The evidence showed that KP had significant issues and that she was in therapy at the Associated Clinic of Psychology, treating with Kathleen Fischer and Tricia MacDonald (Massey) there. The evidence showed that they had concerns about KP's ability to care for her children and about KP's commitment to her therapy and treatment regimen. Ms. Fischer testified credibly that she had concerns about KP's truthfulness regarding drug and alcohol use and about her missing appointments. Both testified that they voiced these concerns in the spring of 2005 to the grievant. Significantly, Ms. Fischer testified that she did not recommend reunification when it was done.

Ms. MacDonald, now Massey, testified that she was only informed of the reunification on June 8th, the day before it was to happen, and voiced concerns about it and spoke out against it. Her memo dated June 14, 2005 was reviewed. In it Ms. Massey indicated that while there were no immediate safety concerns for the children she recommended that the younger children continue their transition to living with KP. She did not recommend that they be reunited right away. She also testified that she was not in agreement with the reunification even though services were to stay in place.

Ms. Veitch testified that she was not aware that the reunification was to occur in any meaningful way until it had already happened. The evidence showed that the grievant did not consult with her prior to making the decision to reunify the children with KP. Moreover, the evidence showed both through documents and testimony that it was proper practice in a situation such as this to consult with the supervisor prior to making the decision to reunify. As noted above, County Exhibit 8 provides that “Consultation with the supervisor must occur in the following situation: ... When a child is going to be returned home.” Clearly, this required the grievant to consult with the supervisor, Ms. Veitch, before deciding to reunify.

Further, Ms. Cork testified credibly that she told the grievant to go ahead with reunification but that she was not given vital bits of information. In an exchange of e-mails, Ms. Cork and the grievant discussed the possibility of reunification. In none of these was the therapists concerns raised. The evidence showed that they had them and that the grievant either did not consult with them or did not make the County Attorney aware of them in her discussions with her prior to the reunification. Finally, Ms. Cork did indicate that “Yes I am OK with reunification but let’s get the Court notification through right away.” She testified that any caseworkers in the grievant’s position would have known what that meant.

Herein lies the essence of the case. The matter in fact revolves around the term used by the Court in its May 23, 2005 Order authorizing reunification “by progress report.” Does it mean that reunification can only occur upon notification to the Court by progress report that everything upon which the Court’s Order was based has remained the same or does it mean that the reunification can occur if the judgment of the caseworkers reunification is appropriate with notification to the Court afterward. The Union contends that it means the latter and that when the Judge used that term it meant that the grievant could proceed with reunification with prior approval of the Court as long as she filed a progress report to update the Court.

The County alleges that under these circumstances it meant that the grievant needed to consult with the supervisor and not reunify until the Court had been advised by progress report that all was well.

Several facts bear heavily on this case. First, the Union witnesses testified that they would feel authorized to reunify only if nothing had changed with the client. Here that was not the case. There were clearly concerns raised by several people between the date of the Court's order and the reunification. KP missed alcosensors, there were concerns about her stability and her commitment to recovery and concerns about her ability to care for the young children. At the very least, these facts should have tipped the grievant off to contact her supervisor and get approval for the reunification before doing it. The Union argued that Mr. Robinson as an experienced case worker would feel comfortable reunifying if all parties were in agreement and nothing new happened between the hearing and reunification date. Here the evidence showed that things did change and that the therapists' concerns were certainly something warranting a call to them and that those concerns be expressed before the reunification occurred. The reports showed that KP was not ready for reunification and that her therapists and others raised those alarms.

Obviously, this tribunal is not to determine whether KP was or was not ready for reunification or whether the children's best interest were served by that or not. That is of course for the Juvenile Court to determine. Here the question is essentially whether the grievant should have communicated with everyone concerned before taking the quantum step to reunify the children. The evidence taken as a whole shows that she did not and that even though she thought the Court had allowed her to reunify both the facts and the County policy in place, see County exhibit 8, should have told her to at least make sure everyone was on board with this decision. In the final analysis, it is for the Court to determine whether reunification was appropriate.

Second, there was some evidence to suggest that the facts as stated to the County Attorney in convincing her to agree to the reunification were not totally complete. The grievant did notify Ms. Cork of the missed alcosensors but did not raise the concerns from the therapists and the guardian ad litem. While this is not to suggest that these facts were intentionally hidden or that the grievant had a secondary agenda to hide them, they did show that the actions of the County Attorney were guided by incomplete information.

The real issue here is the lack of adequate communication with relevant parties prior to the notification. Had the grievant been more complete in her communications to the County Attorney or had she told her supervisor about the concerns raised by therapists and the GAL and then gotten approval for the reunification this case would likely not have occurred. Simply stated, she made assumptions about things that could have been cleared up with better and more communication before taking the action. More importantly, the County showed by a preponderance of the evidence that such consultation and communication was required prior to taking this action.

Third, the testimony of the County's witnesses were persuasive that the term "authorized by progress report" means what it says it meant and that the grievant should have known to consult with at least her supervisor before reunifying the children. This was frankly a difficult call given the clear divergence of opinion by witnesses who had considerable experience in the area and with the Juvenile Court and Child Protection System. County Exhibit 8 appears however to have been in place for several years and the Union provided no evidence to suggest that it was replaced by anything else. The testimony was that consultation would be appropriate if anything changed. The evidence as a whole suggests that doubts are to be resolved in favor to consultation and communication with appropriate therapists or stakeholders in the system. Here the evidence was clear that the grievant acted without such consultation and that some of the material facts were not given to those to whom she spoke prior to the reunification.

Finally, the question of the appropriateness of the level of discipline must be reviewed. The Union claims that this was harsh and excessive. The County claims that it considered termination but decided not to proceed with discharge given the grievant's long history and otherwise good work record. The Union also suggests that the discipline may well have been motivated by the Judge's reaction to this case and his ire directed at Ms. Veitch. The Union also suggests that his statements made at the second hearing were simply inaccurate. The Union suggests that the grievant may be the scapegoat for this since the Judge came down so hard on the Department. While it is clear that the Judge in the case was quite angry, the evidence showed that this was in reaction to the reunification without his knowledge and based on the facts as set forth above. There was however, insufficient evidence to show that the department's reaction was caused solely by the Judge's comments. Rather the evidence showed that the department based its actions on the facts as set forth above.

On balance the discipline meted out was not unreasonable as to warrant a change in it. 10 days for a first time offense may be seen as harsh and some consideration was given to reducing it. There was an inadequate showing that the County acted arbitrarily here to justify a change in the discipline meted out. Accordingly, based on the evidence as a whole, the level of discipline must stand.

AWARD

The grievance is DENIED.

Dated: June 19, 2006

Jeffrey W. Jacobs, arbitrator